

# Duquesne Law Review

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Volume 47  
Number 4 *Separation of Powers in the  
Americas ... and Beyond: Symposium Issue*

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Article 13

2009

## Globalized World and Separation of Powers: A New Role for the Independent Administrative Authorities

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### Recommended Citation

Antonio Lordi, *Globalized World and Separation of Powers: A New Role for the Independent Administrative Authorities*, 47 Duq. L. Rev. 939 (2009).

Available at: <https://dsc.duq.edu/dlr/vol47/iss4/13>

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Globalized World and Separation of Powers: A New  
Role for the Independent Administrative  
Authorities

*Antonio Lordi\**

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*Sed quis custodiet ipsos custodes?*  
- Decimus Junius Juvenalis<sup>1</sup>

I. INTRODUCTION

The doctrine of the separation of powers is intrinsically connected to the theory of the state and the assumption that there cannot be law without a state and that there cannot be a state without law. The separation of powers has been the cornerstone on which the governance of the Western legal world is based in its constant dialectic of democracy and capitalism. It has been a doc-

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1. The sentence could be translated in English as “[w]ho will guard the guards?” *Liber secundus*, *Satira VI*, 347-348 in *D. Junii Juvenalis Saturarum Libri V*. In English, this author is more commonly known as Juvenal, and his works are referred to as the *Satires*.

trine able to bring solutions to the problems of modern democracies all over the world.

In recent times, several changes have occurred in the legal and economic arenas that invite us to consider how these changes may have influenced the doctrine of separation of powers. This paper will give an overview of such changes and reflect on the transformation of the separation-of-powers doctrine, especially with respect to the role and activity of the independent administrative authorities.

The separation-of-powers doctrine was created and developed in a world much different from the one in which we live today. It was a world where closed nation-states focused on solving the problem of how to govern a population in a national territory. Such a model has been successful for almost 200 years<sup>2</sup> as long as governance issues and citizens' demands could be directly solved by one of the three branches of the state.

## II. THE INDEPENDENT-AGENCIES MODEL IN THE UNITED STATES AND EUROPE

The development of capitalism and the consequent requests from the different agents of democratic society (citizens, consumers, workers, investors, corporations, etc.) influenced the structure and composition of the separation-of-powers doctrine. At the beginning of the 19th century in the United States, a number of independent regulatory agencies were created (e.g., in 1887, the Interstate Commerce Commission was established to standardize railroad rates; in 1914, the Federal Trade Commission was set up to prevent unfair methods of competition<sup>3</sup>).

Some of these agencies are part of the executive branch. Others are part of the legislative branch under Congress (e.g., the Government Accountability Office). The nature and purpose of independent agencies vary widely. Some are regulatory agencies with powers to supervise certain sectors of the economy. Others provide special services either to the government or to the people. In most cases, the agencies have been created by Congress to deal with matters that have become too complex for the scope of ordi-

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2. Actually, the separation-of-powers model can be dated back to the beginning of the government organizations with the Greeks and Romans. In modern times, the two main theorists of the separation of powers are Charles de Secondat, Baron de Montesquieu (1689-1755) and Henri-Benjamin Constant de Rebecque (1767-1830).

3. ROBERT B. REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* 24 (Knopf 2007) (2006).

nary legislation. In 1970, for example, Congress established the U.S. Environmental Protection Agency to coordinate governmental action to protect the environment. The Administrative Procedure Act ("APA") of 1946<sup>4</sup> established the protocols for agency rulemaking and decisions in agency enforcement proceedings. The APA also provided for direct judicial review of agency action in the United States Court of Appeals for the District of Columbia Circuit (and then on appeal to the Supreme Court) once all intra-agency procedures have been exhausted.<sup>5</sup>

The U.S. experience in creating the independent agencies clearly indicated that the classic separation-of-powers model was unable to provide regulation to the emergent capitalism. The U.S. model was a beacon for other democracies, which over the last 50 years have created a myriad of agencies. As we will see, the European Union and other European nations have adopted the U.S. independent-agencies model.

In Italy, for example, there is not a general law regulating independent administrative authorities (in Italian, *autorità amministrative indipendenti*). Each authority has its own rules. However, their distinctive trait is that they are independent from the political power. The standard formula used by the Italian legislature in the 1990s was that the authority operated in full autonomy and with independence of judgment and evaluation.<sup>6</sup> The main Italian independent administrative authorities are the Antitrust Authority,<sup>7</sup> the Supervisory Authority Over the Public Works;<sup>8</sup> the Electricity and Gas Authority;<sup>9</sup> the Privacy Authority;<sup>10</sup> the Communications Authority;<sup>11</sup> and the Supervisory Authority over Insurance Sector.<sup>12</sup> With respect to the financial regulation, there are two institutions: the Bank of Italy and the Financial Markets and Stock Exchange Commission ("CONSOB"). The Bank of Italy was created in 1893 by Law Number 449, and the CONSOB was set up in 1974.<sup>13</sup>

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4. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1994)).

5. *Id.*

6. INDEPENDENT ADMINISTRATIVE AUTHORITIES 94 (Roberto Carnata, Mads Andenas, Duncan Fairgrieve eds. 2004).

7. Law n. 287/1990.

8. Law n. 109/1994.

9. Law n. 481/1995.

10. Law n. 675/1996.

11. Law n. 249/1997.

12. Law n. 576/1982.

13. Law Decree n. 95.

In the European Union, several specialized and decentralized agencies exist.<sup>14</sup> These agencies provide an answer for the desire for geographical devolution and the need to cope with new tasks of a legal, technical, or scientific nature. The EU's agencies are grouped into the following four different categories:

- Community agencies (bodies governed by European public law distinct from the community institutions [council, Parliament, Commission, etc.]) with their own legal personalities, which are set up by an act of secondary legislation in order to accomplish a very specific technical, scientific, or managerial task in the framework of the EU's "first pillar."
- Common foreign and security policy agencies (to carry out very specific technical, scientific, or management tasks within the framework of European Union's Common Foreign and Security Policy—the "second pillar" of the EU).
- Police and judicial cooperation in criminal matters agencies (to help the EU Member States cooperate in the fight against organized international crime, the "third pillar" of the EU).
- Executive agencies (established in accordance with Council Regulation (EC) No. 58/2003 (OJ L 11, 16.1.2003)), with a view to being entrusted with certain tasks relating to the management of one or more community programs. These agencies are set up for a fixed period. Their location must be at the seat of the European Commission (Brussels or Luxembourg).

The European agencies try to achieve various goals. They introduce a degree of decentralization and dispersal to the Community's activities; they give a higher profile to the tasks that are assigned to them by identifying the tasks with the agencies themselves; some of them answer the need to develop scientific or technical know-how in certain well-defined fields; and others integrate different interest groups and thus facilitate dialogue at a European or international level.<sup>15</sup> The result is a long list of agencies today operating in the European Union.<sup>16</sup>

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14. Europa, Agencies of the European Union, [http://europa.eu/agencies/index\\_en.htm](http://europa.eu/agencies/index_en.htm) (last visited April 12, 2009).

15. *Id.*

16. Among those agencies are: Community Fisheries Control Agency, Community Plant Variety Office, European Agency for Reconstruction, European Agency for Safety and

### III. A GLOBALIZED WORLD: A NEW CHALLENGE FOR DEMOCRATIC GOVERNANCE

The independent agencies created one century ago to cope with the emerging modern capitalism evolved in synchrony with the separation-of-powers doctrine as its natural completion. The legal-economic panorama that we find today presents new challenges for democracies and their institutions, including the independent agencies.

Five major changes have occurred in recent times. First is the emergence of law without a state,<sup>17</sup> either in the private law area (so called *lex mercatoria* or merchant law<sup>18</sup>) or in the public law sector (so-called global administrative law<sup>19</sup>). Second is the development of new technologies and their increased accessibility to consumers (especially the Internet and use of personal computers as a means of worldwide communication). Third, globalization and global supply chains have developed. Fourth, financial deregulation has occurred. The fifth major change is decentralization and dispersion of state activities. All these changes have created what is generally referred to as a "globalized world." They all derive from the Cold War period and its end, and they are connected to the creation of new technologies, such as the Internet and the global opening of markets.

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Health at Work, European Agency for the Management of Operational Cooperation at the External Borders, European Aviation Safety Agency, European Centre for Disease Prevention and Control, European Centre for the Development of Vocational Training, European Chemicals Agency, European Environment Agency, European Food Safety Authority, European Foundation for the Improvement of Living and Working Conditions, European Fundamental Rights Agency (previously EUMC European GNSS Supervisory Authority), European Institute for Gender Equality, European Joint Undertaking for ITER and the Development of Fusion Energy (Fusion for Energy), European Maritime Safety Agency, European Medicines Agency, European Monitoring Centre for Drugs and Drug Addiction, European Network and Information Security Agency, European Railway Agency, European Training Foundation, Office for Harmonisation in the Internal Market (Trade Marks and Designs), Translation Centre for the Bodies of the European Union.

17. Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663 (2005).

18. FRANCESCO GALGANO, *LEX MERCATORIA* [MERCHANT LAW], Il Mulino, Bologna (1993); FABIO BORTOLOTTI, *DIRITTO DEI CONTRATTI INTERNAZIONALI* [THE LAW OF INTERNATIONAL CONTRACTS], CEDAM, Padova, (1997); UGO DRAETTA, *DIRITTO DEI CONTRATTI INTERNAZIONALI* [THE LAW OF INTERNATIONAL CONTRACTS], CEDAM, Padova (1984); ALDO FRIGNANI, *IL CONTRATTO INTERNAZIONALE, TRATTATO DI DIRITTO COMMERCIALE DELL'ECONOMIA DIRETTO DA FRANCESCO GALGANO* [THE INTERNATIONAL CONTRACT, TREATY OF COMMERCIAL LAW OF THE ECONOMY EDITED BY FRANCESCO GALGANO], VOL. XII, CEDAM, Padova (1987).

19. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005).

This new “globalized world” is a challenge for democratic governance, and the recent global financial crisis is evidence that governments have not been able to monitor, supervise, or prevent such a collapse. Some scholars have pointed out that capitalism took over democracy and that we should try to rebuild a clear border between the two.<sup>20</sup> More than ever, the words of John Maynard Keynes sound prophetic. Keynes, in proclaiming the end of *laissez-faire* economics,<sup>21</sup> declared:

[T]he conclusion that individuals acting independently for their own advantage will produce the greatest aggregate of wealth, depends on a variety of unreal assumptions to the effect that the processes of production and consumption are in no way organic, that there exists a sufficient foreknowledge of conditions and requirements, and that there are adequate opportunities of obtaining this foreknowledge. For economists generally reserve for a later stage of their argument the complications which arise [] (1) when the efficient units of production are large relatively to the units of consumption, (2) when overhead costs or joint costs are present, (3) when internal economies tend to aggregation of production, (4) when the time required for adjustments is long, (5) when ignorance prevails over knowledge and (6) when monopolies and combinations interfere with equality in bargaining—they reserve, that is to say, for a later stage their analysis of the actual facts.<sup>22</sup>

Keynes rejected liberal individualism and its proposed “essential harmony of social and individual interests”<sup>23</sup> and suggested public interventionism in the economy. As a prominent American legal scholar<sup>24</sup> stated a few years before Keynes, the goal is “to find a balance between the desire of the human beings to be equal and their desire to be free.”<sup>25</sup> The problem is *how*. Any time there is a financial crisis, the public opinion blames the lack of proper control and the need for heavier regulation.

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20. REICH, *supra* note 3, at 24.

21. JOHN M. KEYNES, *THE END OF LAISSEZ-FAIRE* 23 (Prometheus Books 2004) (1926).

22. *Id.* at 31.

23. *Id.* at 23.

24. ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 168 (The Lawbook Exchange, Ltd. 2009) (1922).

25. *Id.*

#### IV. A MORAL CHANGE: THE PRINCIPLE OF COMPLEMENTARITY BETWEEN LEGAL SYSTEMS AND ITS IMPLEMENTATION THROUGH INDEPENDENT AUTHORITIES

The solution should not be sought in new regulations or new institutions aimed at rebuilding a border between democracy and capitalism, between citizens and consumers or investors. In effect, as *The Economist* stated recently: "The idea that the markets have ever been completely unregulated is a myth: just ask any firm that has to deal with the Securities and Exchange Commission (SEC) in America[.]"<sup>26</sup>

The solution can be found in a moral and ethical evolution of the societies implemented through the very same institutions that are already in place. In other words, we should not try to create new laws and institutions, but rather use them in a different way, making them bearers of moral and ethical values. In a previous article,<sup>27</sup> I examined the different approaches that civil-law and common-law systems have to economic policies. Civil-law countries are more prone to public interventionism in the economy. Common-law countries generally pursue more liberal policies. In that article, I related the difference to the two main Western religious thoughts, Catholicism and Puritanism. I pointed out that in the era of globalization, the distance between civil-law and common-law systems can be shortened by introducing a new principle: complementarity between legal systems.<sup>28</sup> I ended that article with the observation that:

[H]istory of law is not the effect of natural conditions, and history . . . is not a "natural" but a "moral" phenomenon<sup>[29]</sup> and it would be a "fundamental mistake"<sup>[30]</sup> to believe the opposite . . . The leadership in the world of the law does not derive, and cannot derive, from the economic, military or political strength of a country but from the ethical values that it is able to express. It is on the field of these values and their de-

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26. *A Short History of Modern Finance*, THE ECONOMIST, October 16, 2008, at 79.

27. ANTONIO LORDI, *The Influence of Italian Law on Anglo-American Contract Law: Towards a Principle of Complementarity Between Legal Systems*, INTERDISCIPLINARIETÀ E PLURALISMO NEL DIRITTO D'IMPRESA. L'INTEGRAZIONE DELLE ESPERIENZE E IL RUOLO DEL GIURISTA 31 (2006).

28. *Id.*

29. BENEDETTO CROCE, *STORIA DEL REGNO DI NAPOLI* [HISTORY OF THE KINGDOM OF NAPLES] 272 (Bari) (1925).

30. *Id.*



velopment that, as it has happened in the past, the challenge between legal systems is taking place.<sup>31</sup>

Continuing that path, I believe that the implementation of the principle of complementarity requires the injection of moral and ethical values in societies throughout all of their institutions. In such context, the independent administrative authorities can have an important role as "moral centers"—fundamental means to improve democracies due to their responsiveness to the democratic needs of the society. They can be the main means to implement complementarity between legal systems.

As Benjamin Constant, one of the architects of the separation-of-powers doctrine, warned in 1819 in his speech, "The Liberty of the Ancients Compared with that of the Moderns":

The work of the legislator is not complete when he has simply brought peace to the people. Even when the people are satisfied, there is much left to do. Institutions must achieve moral education of the citizens. By respecting their individual rights, securing their independence, refraining from troubling their work, they must nevertheless consecrate their influence over public affairs, call them to contribute by their votes to the exercise of power, grant them a right of control and supervision by expressing their opinions; and, by forming them through practice for these elevated functions, give them both the desire and the right to discharge these.<sup>32</sup>

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31. Lordi, *supra* note 27, at 31.

32. BENJAMIN CONSTANT, *POLITICAL WRITINGS* 328 (Biancamia Fontana trans., Cambridge University Press 1988) 1767-1830.